Internal Revenue Service

memorandum

CC:TL:Br3
WEArmstrong

date: MAR 8 1988

to: District Counsel, Manhattan NA:MAN

from: Director, Tax Litigation Division CC:TL

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subject: Joint Return After Filing Separate Return

This memorandum is in response to your request of December 8, 1987, for technical advice on the subject of entitlement to elect joint filing status after the issuance of a statutory notice and after the three year statute of limitations period has expired.

ISSUE

Whether a taxpayer can file an amended income tax return electing joint filing status after the Service has issued a statutory notice of deficiency and after the three year statute of limitations period has expired.

FACTS

You state that advice has been requested of you regarding whether taxpayers are entitled to file a joint return where the facts are as follows: Taxpayer fails to file an income tax return. As a result, the Service files a substitute return for taxpayer computing his tax liability using married filing separate rates. Additionally, a statutory notice is issued to taxpayer and the tax liability reflected therein is assessed. After the three year statute of limitations period expires, taxpayer and his spouse file a joint return.

You state that Albany District Counsel has been advising Appeals personnel that if there is a signed audit statement in the administrative file along with a dummy return, based on Smalldridge v. Commissioner, 804 F.2d 125 (10th Cir. 1986), Appeals should reject a subsequent election of joint status. On the other hand, if no audit statement is present and there is only a dummy return, District Counsel, Albany has advised Appeals to process the later filed joint return.

You request our views as to whether the approach of Albany District Counsel should be continued in light of Phillips v. Commissioner, 86 T.C. 433 (1986).

DISCUSSION

I.R.C. § 6013(a) provides generally that a husband and wife may make a single return jointly of income taxes. Where a prior separate return has been filed, I.R.C. § 6013(b)(2) provides limitations to this election. Among them is the limitations that the election may not be made after the expiration of three years from the last date, determined without regard to any extension of time, prescribed for filing a return for the taxable year involved, and the limitation that the election may not be made after a deficiency notice has been mailed to either spouse with respect to the taxable year involved, if the spouse files a petition in the Tax Court with respect to such notice.

In Phillips v. Commissioner, 86 T.C. 433 (1986), appeal docketed, No. 87-1398 (D.C. Cir. Aug. 12, 1987), the Tax Court held that as long as no prior separate return has been filed, a joint return may be filed by a husband and wife subsequent to the issuance of a statutory notice from which a petition is filed with the Tax Court. In so holding, the Tax Court overruled Durovic v. Commissioner, 54 T.C. 1364 (1970), aff'd on this issue, 487 F.2d 36 (7th Cir. 1364). Durovic held that a husband and wife could not file joint returns for years for which neither has filed returns, subsequent to the issuance of a statutory notice for such years or after three years from the last date (determined without regard to any extension of time) prescribed by law for filing the returns for such taxable years.

In Phillips, the husband failed to file timely returns. As a result, the Service for the three taxable years involved filed tax returns on his behalf and issued him a statutory notice. Subsequent to the issuance of the statutory notice, the husband filed a petition with the Tax Court and filed joint returns with his wife for the taxable years involved.

The Tax Court in Phillips, noted that returns prepared by the Commissioner on behalf of taxpayer pursuant to I.R.C. § 6020(b) are "prima facie" good and sufficient for all legal purposes. However, it found there that the returns prepared by the Commissioner on the husband's behalf were dummy returns which do not rise to the level of "returns" or "returns" under I.R.C. § 6020(b). Because it found that the only returns prepared for the husband were dummy returns which do not constitute "returns," the Tax Court concluded that the limitations of I.R.C. § 6013(b)(2) did not apply because prior returns had not been filed. Although the Tax Court in Phillips concluded that the dummy returns were not sufficient in form to satisfy the prior return requirement of I.R.C. § 6013(b), it did not foreclose the possibility that the Commissioner could have prepared returns under I.R.C. § 6020(b) sufficient in form to satisfy I.R.C.

§ 6013(b). But see Phillips, 86 T.C. at 443 (Parr, J., dissenting) (I.R.C. § 6013(b)(1) requires a return filed by an individual not respondent).

It is the Service's position that an unagreed examiner's report is a return under I.R.C. § 6020(b). I.R.M. 4562.33 Thus, when the administrative file contains an examiner report in addition to a statutory notice of deficiency and a dummy return, we believe that the prior return requirement of I.R.C. § 6013(b) is met. This position is supported by the opinions of the Tenth Circuit in Smalldridge v. Commissioner, 804 F.2d 125 (10th Cir. 1986) and the Tax Court in Conovitz v. Commissioner, T.C. Memo. 1980-22.

In Smalldridge, the Tenth Circuit found that the examiner's report (Form 4945-A) constituted a return under I.R.C. § 6020(b). There taxpayer failed to file income tax returns. As a result, the Commissioner, using married filing separate rates, issued a statutory notice of deficiency from which the taxpayer petitioned the Tax Court. In holding for the Government regarding the issue of whether taxpayer was precluded by I.R.C. § 6013(b) from obtaining the benefits of joint rates, the Tenth Circuit noted that prior I.R.C. § 6020(b) returns were prepared for the taxpayer. Thus, taxpayer was bound by the election on such returns and was precluded by I.R.C. § 6013(b) from subsequently filing a joint return and obtaining the benefits of joint rates.

Similarly, in Conovitz, the Tax Court found that dummy returns in conjunction with Forms 1902-E, upon the basis of which a deficiency was determined, constituted I.R.C. § 6020(b) returns. By virtue of the I.R.C. § 6020(b) returns, the Tax Court in Conovitz found that the taxpayer, on whose behalf such returns were prepared, must be treated as having filed as a married person filing separately and, thus, precluded by I.R.C. § 6013(b) from subsequently filing a joint return and obtaining the benefits of joint rates. 1/

We believe also that even if the administrative file does not contain an I.R.C. § 6020(b) return, administrative and equity considerations demand that a taxpayer who has not previously filed a return not be entitled to elect joint filing status after

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1/ It is noteworthy that in Phillips, the argument that the examiner's report constitutes a return under I.R.C. § 6020(b) was not raised. Consequently, there it was not addressed by the Tax Court. In Millsap v. Commissioner, T.C. Docket No. 12357-85, the argument was made. However, the Tax Court has not yet decided the case.

three years of the last date, determined without regard to any extension of time, prescribed by law for filing the return or after the Commissioner has sent a notice of deficiency to him determining his tax liability on the basis of a married individual filing separate rates, and the taxpayer has filed a petition in the Tax Court challenging the deficiency. Although this view was rejected by the Tax Court in Phillips and questioned by the Claims Court in Tucker v. United States, 8 Cl. Ct. 575 (1985), it is supported by Durovic, which has not been reversed and Morgan v. Commissioner, 807 F.2d 81 (6th Cir. 1986).

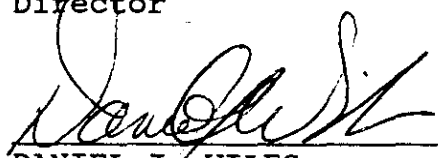
As noted the Tax Court in Phillips held that where no prior return has been filed or were a dummy return has been filed, the limitations under I.R.C. § 6013(b) do not bar a taxpayer from obtaining the benefits of joint rates. Although we disagree with the holding, we think that where the administrative file does not contain an examiner's report but only a dummy return, the Service at this time, in light of Phillips, should not automatically reject taxpayers' election of joint status. Rather, under such circumstances, we recommend that where a statute of limitations problem does not exist (starting with the date the joint amended return was filed), the case should be held in abeyance until the District of Columbia Circuit decides Phillips. If, however the statute of limitations is about to expire and thus the case cannot be held in abeyance, we recommend that the taxpayers not be given the benefit of joint rates (consistent with our appeal in Phillips). Obviously, nothing said here precludes settlement based upon litigating hazards. However, regard should be taken as to the proper circuit to which the case might be appealed from the Tax Court.

Where the administrative file contains an examiner's report, in addition to a dummy return and statutory notice of deficiency, we believe that the requirements for an I.R.C. § 6020(b) return have been met and the prior return requirement of I.R.C. § 6013(b) has been satisfied. Accordingly, under such circumstances, we believe, based on Smalldridge and Conovitz that the Service is justified in rejecting a joint return filed after 3 years of the last date, determined without regard to any extension of time, prescribed by law for filing the return or after the Commissioner has sent a notice of deficiency to the taxpayer determining his tax liability on the basis of a married individual filing separate rates, if the taxpayer has filed a petition in the Tax Court challenging the deficiency.

When Phillips is decided by the District of Columbia Circuit, the questions you have raised should be resolved. At this time Phillips is scheduled for oral argument on April 28, 1988. For your information we are attaching the July 10, 1987 appeal letter in Phillips. This sets out in detail the position

of this office with respect to Phillips and the issue of filing a joint return after filing a separate return. If we can be of any further assistance to you in this matter, please contact us.

MARLENE GROSS
Director

By: 
DANIEL J. WILES
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Attachments:
As stated